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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 183

THE ASSOCIATED PRESS,

Petitioner,

v.

TAFT-INGALLS CORPORATION,
formerly known as THE CINCINNATI
TIMES-STAR COMPANY, an Ohio Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The memorandum opinion of the District Court has not been reported. It is printed in the Petition at pages 60a-69a, as Appendix B. The opinion of the Court of Appeals for the Sixth Circuit is reported in 340 F.2d 753 and is appended to the Petition at pages 1a-59a, as Appendix A.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition at page 2.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the requirement of The Associated Press ("AP") that The Cincinnati Times-Star Company ("Times-Star") receive and pay for its "A," "D" and Kentucky State wires which Times-Star did not want or need, in order to receive the Ohio Big Cities wire which Times-Star did want and need, and which requirement forced Times-Star to give up its independent judgment in determining whether to subscribe to the three unwanted and unneeded news services, constituted a tie-in arrangement in violation of the antitrust laws?

2. Did the Court of Appeals err in finding that the Ohio Big Cities wire of AP was separable and distinct from its "A," "D" and Kentucky State wires?

STATUTES INVOLVED

The statutes involved are the Sherman Act, Sections 1 and 2 as amended, 15 U.S.C. §§ 1 and 2, Act of July 2, 1890, chapter 647, §§ 1 and 2, 26 Stat. 209; Act of August 17, 1937, chapter 690, Title VIII, 50 Stat. 693; Act of July 7, 1955, chapter 281, 69 Stat. 282; and Sections 3 and 4 of the Clayton Act, 15 U.S.C. §§ 14 and 15; Act of October 15, 1914, chapter 323, §§ 3 and 4, 38 Stat. 731. The texts of these statutes are set forth in the Petition at pages 74a-76a, as Appendix F.

STATEMENT OF THE CASE

Times-Star was an Ohio corporation which for many years published an evening daily newspaper at Cincinnati

called *The Cincinnati Times-Star*. On July 19, 1958, publication was discontinued and some of its assets were sold to The E. W. Scripps Company ("Scripps") publisher of the other Cincinnati evening newspaper (Par. 10 of Stipulation, P. Ex. 7; R. 92a, 418a at 420a-21a, 424a-25a; R. 94a-95a).* AP is a "mutual and cooperative" non-profit membership corporation that was organized in 1900 under the Membership Corporation Law of New York (By-Laws, Article I, P. Ex. 6; R. 393a at 398a-99a). It is engaged in the gathering of "all kinds of news" (By-Laws, Article I, P. Ex. 6; R. 393a at 393a-99a) through its own instrumentalities and from its members, and in furnishing of such news to its members for publication (Par. 2 of Stipulation, P. Ex. 7; R. 92a, 418a at 419a). Times-Star was a member of AP (Par. 11 of Stipulation, P. Ex. 7; R. 92a, 418a at 421a).

Underlying the entire controversy in this case is the established practice of AP going back to 1935 when member newspapers in forty-three (43) metropolitan areas in the United States, including Cincinnati, Ohio, were *required* by AP to take a package of basic news wire services (R. 156a-57a, 207a, 214a-15a). These areas make up the major newspaper markets in the United States (D. Ex. 31; R. 220a, 462a; D. Ex. 47; R. 292a, 511a), and are considered by AP to be "trunk points" (D. Ex. 31; R. 220a, 462a; R. 156a-57a, 207a, 214a-15a). A member which publishes a newspaper in any of these metropolitan areas or trunk points *must agree* to receive and pay for certain trunk circuits and an AP regional or state circuit (R. 128a-30a, 155a-56a, 163a, 212a-14a, 238a, 240a, 280a). With respect to trunk points east of Kansas City and north of the Mason-

* P. Ex. is Petitioner's (AP) Exhibit; D. Ex. is Respondent's (Times-Star) Exhibit; Exhibits are attached as part of Respondent's Appendix in the court below (Volume 3 of the Certified Record) filed with the Petition. All record citations (R. ...) are to pages in Respondent's Appendix in the court below (Volume 3 of the Certified Record).

Dixon line, the AP news services consist of (1) the "A" trunk circuit, carrying top bulletin news of general interest, (2) the "D" trunk circuit, carrying financial and business news and commodity quotations, and (3) the applicable state or multiple-state big cities circuit or circuits carrying state and regional news (R. 160a, 214a-15a, 280a; D. Ex. 41; R. 289a, 497a-98a; D. Ex. 42; R. 244a, 501a-02a). AP's "D" trunk circuit does not run west of Kansas City or Sioux City, Iowa (R. 212a). In the western part of the United States, newspapers located at trunk points must receive and pay for two news services of the AP, the "A" trunk circuit, and the applicable state or multiple-state circuit (R. 157a-60a).

Any member of AP located in a trunk point city may not subscribe to less than all of the AP wire circuits comprising AP's leased wire news service at the particular trunk point (D. Ex. 41; R. 289a, 497a-98a, R. 128a-30a). This has been AP's policy "from the time of the organization of the AP" (R. 130a).

A member of AP which is located in a rural area or in a city which is *not* a trunk point must receive a composite of news sent out by AP on a single circuit, which comprises its leased wire news service for such places (R. 129a, 165a-68a, 215a-16a). In some cases such members may also receive, in addition to the single circuit, but on an optional basis, one or more of the other AP circuits furnished to members at trunk points (R. 166a-68a).

Following the adoption of extensive amendments to the By-Laws of the AP in 1945, the Board of Directors of AP in 1946 prescribed a standard form of Agreement to be signed by each member (Par. 9 of Stipulation, P. Ex. 7; R. 92a, 418a at 420a; Art. II, Sec. 8, P. Ex. 6; R. 393a at 401a). On August 4, 1948, pursuant to the mandate of a new By-Law to all members of AP, Times-Star signed an

Agreement with AP on its standard form (P. Ex. 4; R. 65a, 390a). This Agreement provided, among other things, that AP would provide a "leased wire news service" to Times-Star. This leased wire news service consisted of a "package" of services including the "A" trunk circuit, the "D" trunk circuit and the Ohio Big Cities circuit, also known as the "S" trunk circuit (Par. 13 of Stipulation, P. Ex. 7; R. 92a, 418a at 421a-23a). In addition, AP's leased wire news service for Times-Star included the Kentucky State wire circuit containing state news of interest to Kentucky readers (R. 157a, 205a).

Each of the wire circuits of AP is functionally and operationally separate and distinct (R. 161a, 165a-66a, 179a-80a, 208a, 211a); news is broken down by employees of AP into classifications appropriate to the three circuits (R. 185a-87a, 216a, 238a-39a, 258a-60a, 261a, 269a; D. Ex. 42; R. 244a, 501a-02a); the three circuits are controlled separately, connect different cities and are operated at different hours (R. 161a, 183a, 208a-11a; D. Ex. 32a-34a; R. 220a, 462a-66a). The classification of news for each of the three circuits is recognizable and distinguishable (Par. 13 of Stipulation, P. Ex. 7; R. 92a, 418a at 421a-23a; R. 114a, 185a-87a, 205a, 216a, 238a-39a, 258a-61a, 265a, 269a-70a, 284a-85a; D. Ex. 42; R. 244a, 501a-02a). Certain specialized news of AP is further broken down and classified into sports dispatches, tabular stock market quotations, other regional dispatches, wire photo service, features, etc. which do not comprise part of AP's basic "leased wire news service" (Par. 17 of Stipulation, P. Ex. 7; R. 92a, 418a at 423a-24a). This specialized news is furnished over separate facilities as supplemental or optional news services and each may be purchased for an additional charge and received only by a member who receives the basic leased wire news services of AP (R. 154a-56a).

In 1957 Times-Star was publishing its newspaper at a loss. In an attempt to reduce its losses, on September 10, 1957, Times-Star asked AP to furnish it only the Ohio Big Cities news wire and to discontinue the other three news wires in AP's package. AP refused its request because of its long-established policy of requiring all members to receive and pay for a "package" of wire services (R. 109a-10a, 280a, 285a, 288a). As the Court of Appeals stated "appellant [Times-Star] found the Ohio Big Cities wire to be so desirable and indispensable to its requirements that, when AP refused to furnish it except when 'tied-to' three other wires, appellant [Times-Star] continued to subscribe to and pay for all four wires, although it desired only the Ohio regional service and was experiencing a recurring operating deficit" (App. A, Petition at 30a).

When Times-Star ceased publishing its newspaper on July 19, 1958 and sold some of its newspaper assets to Scripps, no back assessments were owing (Par. 18 of Stipulation, P. Ex. 92a; 418a at 424a). Scripps requested AP to furnish it only the "A" trunk circuit but AP refused to do so. AP advised Scripps that it was the established practice of AP not to sell separately the three news wires comprising its basic news services to a metropolitan newspaper in Ohio and that any one of the three news wires must be taken, if at all, with the other two news wires as a unit and paid for as a unit (R. 236a-40a). The Kentucky State wire was arbitrarily dropped in the proposal made to Scripps (R. 240a-41a) after having been included in the package initially proposed by AP (D. Ex. 42; R. 244a, 501a-02a).

AP sued Times-Star in the District Court for the Southern District of Ohio for two years' wire service charges or assessments, claiming breach of contract because of Times-Star's failure to give AP two years' advance notice of its termination of the "package" of news services. AP invoked

federal diversity jurisdiction under Title 28 United States Code Section 1332. Times-Star's Amended Answer raised the issue, among others, that under the antitrust laws AP's long-standing practice of tying each of its three basic wire services to a package invalidated the contract between the parties. Times-Star also filed a counterclaim under Title 15 United States Code, Sections 1 and 15 seeking to recover damages from AP because it had refused to sell Times-Star only one of its basic news wire services in September 1957 without the other three, in keeping with its unlawful tying practice.

The District Court (Judge Frank J. Battisti sitting without a jury) denied the defense of AP's unlawful tying practice and dismissed Times-Star's counterclaim, for the reason that Times-Star had failed to show that there was "a natural division in the cost of gathering news transmitted" over the three basic wire services. Judge Battisti held that unless "such a complete division" of cost could be shown it would be "unnecessary and futile to explore the other elements of the alleged tying agreement" (App. B, Petition at 66a-67a).

On the basis of this Court's holding in *Associated Press* v. *United States*, 326 U.S. 1, 7 (1945), the Court of Appeals recognized that "AP cannot escape the consequences [of the Sherman Act] on the theory that it is a mutual and cooperative association, distributes news only among its own members, pays no dividends, defrays its expenses through assessments, and does not 'sell' news for a 'price'" (App. A, Petition at 9a). The Court of Appeals had "no doubt that a division could be made by AP for a separate charge for its Ohio Big Cities wire" (App. A, Petition at 25a). Then that Court limited its holding on the issue of separability solely to the Ohio Big Cities wire (App. A, Petition at 25a). It found that the Ohio Big Cities wire was a product "separable and distinct" from the other

wires included in the package of services furnished to Times-Star (App. A, Petition at 26a). Moreover, the Court of Appeals stated that "the record clearly establishes that AP required appellant [Times-Star] to continue to subscribe and pay for three wires which appellant [Times-Star] did not want and need, in order to receive a fourth wire which it considered to be essential, and thereby forced appellant [Times-Star] to give up its independent judgment as to whether to subscribe to the three unwanted and unneeded services" (App. A, Petition at 18a).

The Court of Appeals also found that the other essential elements of an antitrust violation were established. Specifically, the Court found that Times-Star satisfied the requirement of showing that AP had "sufficient economic power" because of *the uniqueness of AP's news dispatches and the desirability of the tied product* (App. A, Petition at 28a-30a). Also, the Court found from the evidence in the case that "a not insubstantial amount of commerce is affected" by the illegal tie-in arrangement of AP (App. A, Petition at 30a-31a).

Having found a clear violation of Section 1 of the Sherman Act, the Court of Appeals would not enforce the contract by requiring Times-Star to pay for two years of wire services it never received and thereby enforce ". . . the precise conduct made unlawful by the [Sherman] Act" *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), at 520. Even though the Court found that Times-Star had suffered injury, it dismissed Times-Star's counterclaim because "the evidence of damages is too speculative to support the counterclaim" (App. A, Petition at 34a).

There is now pending before this Court a Petition for Writ of Certiorari (No. 185) filed by Times-Star presenting only the question "where both an illegal tying arrangement under the Sherman Act and injury to the buyer have been established, what is the measure of proof required by

the buyer to prove the extent of his injury when the seller has no separate prices and maintains no separate cost records for the tied services?" In that Petition Times-Star did not ask this Court to review any of the questions raised in the instant Petition because such questions have already been settled by decisions of this Court.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. The Decision of the Court of Appeals is Not in Conflict With the Decisions of This Court in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948), or *Automatic Radio Co.* v. *Hazeltine*, 339 U.S. 827 (1950), or *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962) or with the Decision of the Court of Appeals for the Tenth Circuit in *McCullough Tool Company* v. *Well Surveys, Inc.*, 343 F.2d 381 (1965).

The Court of Appeals found that AP "required" metropolitan newspaper members, including Times-Star, to receive and pay for a package of "separable and distinct" news wires (App. A, Petition at 10a, 17a, 18a, 26a). It did not find that AP merely "offered" its package of news wires to metropolitan newspaper members. This Court pointed out the significance of the distinction in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948), at 159:

> "We do not suggest that films may not be sold in blocks or groups, *when there is no requirement, express or implied, for the purchase of more than one film.*" (Emphasis added)

The requirement of AP found by the Court of Appeals in the instant case had existed ever since 1935 (App. A, Petition at 7a, 10a). As the Fourth Circuit stated, the "gravamen" of illegality in tying arrangements "is the

forbidden condition, agreement, or understanding . . . whether this is voluntary or is imposed by coercion." *McElhenney* v. *Western Auto Supply Co.*, 269 F.2d 332, 338 (4th Cir. 1959). Accordingly, the contract in the instant case was unenforceable because of AP's requirement for the purchase of its package of news wires.

The cases of *Automatic Radio Co.* v. *Hazeltine*, 339 U.S. 827 (1950), *McCullough Tool Company* v. *Well Surveys, Inc.*, 343 F.2d 381 (10th Cir. 1965), and *United States* v. *Loew's, Inc.*, 189 F. Supp. 373 (S.D. N.Y. 1960), *aff'd.*, 371 U.S. 38, cited by AP (Petition at 14-16) as in conflict with the decision of the Court of Appeals in this case, also are clearly distinguishable and are not in conflict.

In *Automatic Radio Co.* and *McCullough Tool Company* there was no *requirement* that the licensee accept a package of patents. AP (Petition at 15) quotes only the underscored words from a portion of this Court's opinion in *Automatic Radio Co.*:

> ". . . there is no conditioning of the license grant upon the acceptance of another and different license. We are aware that petitioner asserted in its countermotion for summary judgment in the District Court that *Hazeltine refused to grant a license under any one or more of its patents to anyone who refused to take a license under all.* This averment was elaborated in the affidavit of petitioner's attorney in support of the motion. The point was not pressed in the Court of Appeals or here. In any event there is nothing available in the record to support the averment. . . ." 339 U.S. at 831.

In *McCullough Tool Company* the Tenth Circuit referred to this Court's decision in *Automatic Radio Co.* and then pointed out:

> "There is no such showing of coercion in this case. In fact the trial court specifically found: 'After June 1,

> 1956, WSI has been willing to grant licenses on its patents individually or collectively upon negotiated reasonable terms . . .'." 343 F.2d at 408.

AP (Petition at 16) also misses the point of Judge Dawson's ruling in *Loew's* that the "Big 50" films, a block of films, were not "block booked" with Storer Television Stations. The basis of the ruling was NTA's "categorical denial", not contradicted by Mr. Storer, that it required Storer to accept films in blocks (189 F. Supp. at 394). The Court certainly was not ruling that at the time the contract was executed a specific demand for less than the block of films was a prerequisite to illegality in tying cases since it had disposed of that question earlier in its opinion when it stated:

> "The Court does not believe that a specific 'demand' is a necessary prerequisite of a finding of refusal if there is sufficient other evidence to justify a finding that there was a refusal on the part of the distributor to deal except on a block-booked basis." 189 F. Supp. at 381.

AP's Petition totally ignores the Court of Appeals' finding that the contract executed by the parties in 1948 was of a *continuing nature* (App. A, Petition at 10a, 18a, 20a, 30a, 53a). The Court below certainly did not find that the parties' continuing performance under the contract constituted "an intelligible economic transaction in itself", as AP contends it should be characterized (AP Petition at 19). Such a holding would mean that Times-Star was required forever to receive and pay for AP's *unwanted and unneeded* "A", "D", and Kentucky State wires in order to continue to receive AP's *indispensable* Ohio Big Cities wire because Times-Star did not request less than the package in 1948 (App. A, Petition at 18a, 30a). Indeed, AP provided no means by which Times-Star could discontinue

receiving and paying for separable, unwanted, unneeded, and expensive news wires. As the Court of Appeals stated, "This is one of the situations which is 'an object of anti-trust concern' *United States* v. *Loew's, Inc.*, 371 U.S. at 45" (App. A, Petition at 18a).

In attempting to lure this Court's attention to the circumstances surrounding the execution of the contract in 1948, AP also totally ignores the Court of Appeals' finding that AP's illegal tying arrangement was not embodied in the contract but established from AP's course of conduct:

> "It is true that no tying arrangement is spelled out expressly in the contract between the parties upon which AP based this action, or in the AP By-Laws. The result is accomplished by the By-Law provision that the nature and extent of the news service to be furnished a member shall be determined by the Board of Directors.
>
> "A tying arrangement or condition 'need not be expressly embodied in written contracts. Such arrangements may be deduced from a course of conduct.' *Osborn* v. *Sinclair Refining Co.*, 286 F.2d 832, 837 (C.A. 4), cert. denied, 366 U.S. 963, 81 S.Ct. 1924, 6 L.Ed. 2d 1255. The tying arrangements found unlawful in *United States* v. *Loew's, Inc.*, *supra*, and *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260, were not spelled out in contracts" (App. A, Petition at 22a-23a).

Similarly, *McElhenney* v. *Western Auto Supply Co.*, 269 F.2d 332 (4th Cir. 1959), and *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. den.* 377 U.S. 993, hold that illegal tying arrangements need not be embodied in written contracts but may be established by a course of conduct.

The Court of Appeals held that AP's *conduct*, not its *contracts*, requiring Times-Star and other metropolitan

newspaper members to receive and pay for a package of news wires violated the antitrust laws. The significance of the distinction is that the circumstances surrounding AP's imposition of the *requirement* in this case, not those leading to the contract of 1948, show that AP exercised coercion. The requirement was coercion, which had its *impact* on Times-Star in 1957 when AP refused to furnish Times-Star only the Ohio Big Cities wire (App. A, Petition at 6a-9a). In both *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953), and *Northern Pacific Railroad Co.* v. *United States*, 356 U. S. 1 (1958), this Court spelled out how sellers exercise coercion in employing illegal tying arrangements:

> "*By conditioning his sale of one commodity on the purchase of another*, a seller *coerces* the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market." (Emphasis added; 345 U.S. at 605 and 356 U.S. at 10.)

The Court of Appeals held it was no defense for AP to contend that Times-Star was bound by its contract for another two years to take the AP's package of news wires (App. A, Petition at 10a). It stated that if AP's "practice" violates Section 1 of the Sherman Act, it is "axiomatic" that the contract "is 'illegal' under the express terms of the statute" (App. A, Petition at 10a). The Court quoted from this Court's opinion in the *Loew's* case as follows:

> ". . . [t]he thrust of the antitrust laws cannot be avoided merely by claiming that the otherwise illegal conduct is compelled by contractual obligations. Were it otherwise, the antitrust laws could be nullified. Contractual obligations cannot thus supersede statutory imperatives." (371 U.S. at 51; App. A, Petition at 10a.)

More recently, this Court struck down an agreement in violation of the antitrust laws although the parties entered into it voluntarily. In *Simpson* v. *Union Oil Co.* 377 U.S. 13 (1964), this Court pointed out:

> "The interests of the Government also frequently override agreements that private parties make. Here we have an antitrust policy expressed in the Acts of Congress. Accordingly, a consignment, no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy." 377 U.S. at 18.

II. The Court of Appeals Properly Refused to Enforce the Unlawful Contract.

One of the most distinguishing facts in this case is that no back assessments are involved. Times-Star paid in full for all news dispatches it received before it stopped publication. It has already paid for news services of AP that it did not want or need. Therefore, this is not an action to recover for goods sold and delivered, or to require a party to pay for benefits received by him. AP seeks to require Times-Star to pay for two years of news wire services it never received. Accordingly, the decision in *Kelly* v. *Kosuga*, 358 U.S. 516 (1958) where title to the property under the contract passed to the purchaser, is not in point.

In *Kelly* the petitioner purchased fifty cars of onions from the respondent. All of the onions were placed in storage for the benefit of the petitioner. After the sale the petitioner paid for thirteen cars of the onions but defaulted in the payment for the remainder. The respondent sued the petitioner for the unpaid purchase price and storage charges. The petitioner defended on the ground, among others, that the sale was made pursuant to an agreement which violated the Sherman Act in that respondent and

other onion growers agreed not to deliver any onions on the futures market.

This Court recognized that there was a "completed sale" in *Kelly* and, therefore, was guided by the overriding general policy "of preventing people from getting other people's property for nothing when they purport to be buying it." 358 U.S. at 520-21. It was the Court's position that "it can hardly be said to enforce a violation of the [Sherman] Act to give legal effect to a completed sale of onions at a fair price." 358 U.S. at 521. So the Court rejected the Sherman Act defense which was clearly based on circumstances collateral to the contract, and permitted the respondent-seller to recover. However, the Court reiterated the fundamental principle that it will not enforce a contract violative of the antitrust laws when "the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act." 358 U.S. at 520. See *McMullen* v. *Hoffman*, 174 U.S. 639, 654 (1899), in which this Court long ago held that "the authorities . . . unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. . . ."

Unlike the *Kelly* case, the Court of Appeals found in the instant case that "the Sherman Act is interposed as a defense, not to defeat an obligation for services received, but to avoid paying weekly assessments for two years after appellant [Times-Star] had ceased publication of *Times-Star* and had sold its newspaper" (App. A, Petition at 33a). Cf. *Tampa Electric Co.* v. *Nashville Coal Co.*, 276 F.2d 766 (6th Cir. 1960), *rev'd. on other grounds*, 365 U.S. 320 (1961) which concerned the enforceability of an executory contract found by the Sixth Circuit to be illegal under the Clayton Act; therefore, enforcement was denied *in futuro*. Unlike the *Kelly* case, here the contract was illegal under the Sherman Act because of AP's longstanding *requirement* of a package purchase; therefore, the Court of

Appeals would not require Times-Star to pay for two years of news wire services it never received, and thereby enforce "the precise conduct made unlawful by the [Sherman] Act." 358 U.S. at 520.

III. The Decision of the Court of Appeals on the Factual Issue of Separability is Not in Conflict With the Decision of this Court in *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953) or the Decision of the First Circuit in *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F.2d 653 (1961), *cert. den.*, 368 U.S. 931.

Neither *Times-Picayune* nor *Dehydrating Process* was of any help to the Court below in resolving the narrow factual issue of separability. Both cases are clearly distinguishable. As to the force of *Times-Picayune* as a precedent, the Sixth Circuit noted, as this Court did in *Northern Pacific Railroad Co.* v. *United States*, 356 U.S. 1, 10 (1958), that "the *Times-Picayune* case has been limited to the exact state of facts before the court" (App. A, Petition at 14a). Moreover, the Sixth Circuit observed that the rationale of *Times-Picayune* was weakened by the subsequent decision of this Court in *Northern Pacific* (App. A, Petition at 13a). In commenting on *Dehydrating Process*, the Sixth Circuit recognized that the decision did not really turn on the question of separability. This is evidenced by the fact that the First Circuit based its decision on "sound business reasons" and, as stated by the Sixth Circuit, such a decision "would seem to presuppose there are two separate products" (App. A, Petition at 16a).

In resolving the factual issue of separability the Sixth Circuit relied primarily on two cases which set forth useful tests of criteria of separability, *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd.*, 365 U.S. 567 (1961), and *United States* v. *Loew's, Inc.*, 189

F. Supp. 373 (S.D. N.Y. 1960), *aff'd.*, 371 U.S. 38 (1962). Transposing these criteria of separability to the facts in the instant case, the Court of Appeals properly found:

> "1. AP's competitor, UPI, offered everything necessary for a complete news service, but did not charge for its basic wires in a single package as did AP;
>
> "2. The number of news dispatches of AP and other news services vary considerably and are used by newspapers as space and interest warrant. Hardly any two versions are the same;
>
> "3. UPI charges separately for its news wires, as does AP for the Kentucky wire (at least in its proposal to Scripps), the sports wire, and various supplemental wires;
>
> "4. Finally, AP offered certain wires on an optional basis, but required appellant to subscribe for the 'A' wire, 'D' wire and Kentucky wire on a 'package' basis in order to receive the Ohio Big Cities wire" (App. A, Petition at 22a).

In the *Loew's* case, the defendants argued before the District Court that the block-booked feature films were really all alike and therefore not separate. In our case the AP argues "news is news" and therefore inseparable (Petition at 21). Judge Dawson acknowledged in *Loew's* that, true films are films ("news is news"), "but they vary in theme, in artistic performance, in stars, in audience appeal, etc." As he also said, "Each film was unique in its subject matter and presentation" 189 F. Supp. at 381. Here AP's news dispatches are also not only unique but they possess a uniqueness "to suggest comparison with a monopoly by patent", as stated by the Court of Appeals (App. A, Petition at 29a). Judge Dawson continued:

> "In order to be a 'tie-in' there must, of course, be two distinct products, but grades of feature films

> might constitute different products. To say that a television station may not license 'Gone With The Wind' unless, at the same time it licenses 'Getting Gertie's Garter' is just as much a tie-in of disparate products as to say a buyer may not purchase a certain salt machine unless he also buys a particular brand of salt." 189 F. Supp. at 381.

In the more recent case of *American Manufacturers Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 221 F. Supp. 848 (S.D. N.Y. 1963), cited with approval by the Sixth Circuit (App. A, Petition at 14a-15a), the defendant argued there was only one product involved: the sponsorship of a television program, citing *Times-Picayune*. The Court disagreed, holding "35 undesirable stations are not the same as 95 desirable stations. Nor are 35 additional stations the same product as the sponsorship of a unique program". It follows that three or even two "undesirable" news wires are not the same as one "desirable" news wire. Nor are four news wires the same product as a news report which may come over many wires and which may not be desired by a newspaper over all wires.

The Court of Appeals correctly found from all the evidence in the case "that the Ohio Big Cities wire was a product separate and distinct from the other AP wire services just as were motion picture films in *United States* v. *Loew's, Inc.*, *supra*, the television program in *American Manufacturers Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, *supra*, and the community television antenna equipment in *United States* v. *Jerrold Electronics Corp.*, *supra*." (App. A, Petition at 26a).

AP completely overlooks the many facts set forth herein (supra pages 3-5) which were carefully considered and relied upon by the Sixth Circuit in resolving the issue of separability (App. A, Petition at 11a-26a). On the other

hand, in an attempt to magnify this narrow factual issue into one warranting review by this Court, AP argues that enforcement of the restriction as to the tie-in of its news services will be very disadvantageous to it and its members and greatly impair its ability to operate efficiently. This is precisely the same argument asserted by Columbia Pictures in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948) and rejected when this Court made it clear that:

> ". . . the policy of the anti-trust laws is not qualified or conditioned by the convenience of those whose conduct is regulated. Nor can a vested interest in a practice which contravenes a policy of the anti-trust laws receive judicial sanction." 334 U.S. at 159.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari filed by AP should be denied.

Respectfully submitted,

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